TAN CHEE LAN & ANOR

v.

DR TAN YEE BENG

HIGH COURT MALAYA, MELAKA
AUGUSTINE PAUL JC
[CIVIL APPEAL NO: 12-21-1994]
15 NOVEMBER 1996

LAND LAW: *Tenancy - Whether tenant can surrender tenancy without approval of landlord - Whether tenancy can be surrendered by unilateral act - Whether tenancy valid - National Land Code 1965, s. 239(1), (3)*

LAND LAW: *Loans - Assignment - Whether deed of assignment conferred personal privilege - Whether appellants had capacity to grant tenancy - Whether consent required from owner of premises*

LANDLORD & TENANT: *Landlord's title - Whether tenant estopped from denying title - Whether s. 116 of the Evidence Act 1950 applicable*

CONTRACT LAW: *Misrepresentation - Whether tenancy induced by misrepresentation - Effect of s. 19 Contracts Act 1950*

The appellants had purchased a shoplot and to facilitate the purchase they entered into a loan agreement with Central Malaysian Finance Bhd ('CMF'). The appellants had by a deed of assignment assigned their rights, title and interest on the property to CMF. The shoplot was then leased by the appellants to the respondent for three years. After the respondent had gone into ocupation of the shoplot, CMF wrote to the respondent informing him that it was the absolute owner of the shoplot and that the rental was to be paid to CMF. The appellants were asked to confirm and to give an undertaking for compensation should the respondent suffer damages as a result of the dispute between the appellants and CMF. In the meantime rental for the shoplot was not paid to the appellants until they threatened to institute legal action against the respondent. Shortly thereafter the respondent received a notice to quit from CMF. The respondent wrote to the appellants regarding the quit notice but when it was not withdrawn the keys to the shoplot were returned to the appellants. Three years after the lease expired an action was brought against the appellants for damages by the respondent. The respondent's case was that it was induced to enter into the tenancy agreement believing that the appellants had a good title and the right to let the property. Thus pursuant to s. 19 of the Contracts Act 1950 the respondent was entitled to avoid the tenancy agreement. However, it was contended by the appellants that the respondent

was estopped from denying the title of the appellant pursuant to s. 116 of the Evidence Act 1950 ('the EA') and that the respondent was adequately protected under the tenancy agreement. Consequently, the respondent had breached the tenancy agreement and the appellants counterclaimed against the respondent.

Held:

[1] Section 239(1) and (3) of the National Land Code 1965 ('the Code') allows the oral or written surrender of a tenancy exempt from registration provided it is done with the agreement of the landlord.

[1a] In effect a surrender of a tenancy cannot be done by a unilateral act and the assent of both parties to the lease is required. The respondent had made a unilateral surrender of the tenancy by handing over the keys to the appellants but the retention of the keys was not sufficient to effect a surrender unless there was some unequivocal act of retaking possession of the premises by the landlord. The respondent had vacated the premises without any consent and in law it did not amount to a surrender.

[2] Section 19 of the Contracts Act 1950 only renders an agreement voidable if it is entered into by misrepresentation; the contract is valid till it is set aside by the representee. In the instant case had there been misrepresentation by the appellants it had been accepted by the respondent.

[3] Section 116 of the EA disallows a tenant from denying his landlord's title for as long as he is in possession of the premises. This is so even though the landlord's title is merely equitable and therefore at law a nullity.

[3a] The appellants were precluded from relying on estoppel as a defence as it was not pleaded. Furthermore, the estoppel created by s. 116 of the EA operates only during the continuance of the tenancy.

[4] Licensees do not have power to grant a tenancy. The hallmark of a licence is that the obligations and rights conferred on the licensee amount to a personal privilege. The rights and obligations of the appellants conferred by the loan agreement would bind their successors in titles and assigns. These rights and obligations were not personal. Therefore the loan agreement vested certain interests in the appellants pursuant to which they could lawfully grant a tenancy.

[5] The holder of a title paramount may impliedly consent to a tenancy agreement entered into without his express agreement but there must be some positive act emanating from the holder of the title paramount from which one can reasonably infer that he has consented or acquiesced to the tenancy which has been created. CMF had by letter accepted the respondent as its tenant thus amounting to a positive act. Thus, the tenancy agreement between the appellants and the respondent was valid.

[6] The respondent had no cause of action against the appellants and as the surrender of the tenancy was unlawful the appellants were not in beach of the tenancy agreement. The appellants had also no cause of action against the respondent.

[Appeal allowed; counterclaim dismissed.]

Cases referred to:

Ban Seng v. Yap Pek Soo [1967] 2 MLJ 156 ***(refd)***

Industrial Properties (Barton Hill) Ltd & Others v. Associated Electrical Industrial Ltd [1977] 2 WLR 726 ***(refd)***

Harrison v. Wells [1967] 1 QB 263 ***(refd)***

Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1980] 1 MLJ 21 ***(refd)***

Fatimah v. Moideen Kutty [1967] 1 MLJ 72 ***(refd)***

DV Rajam v. PG Rajiah AIR [1953] Hyd 241 ***(refd)***

Rosman bin Haji Abdul Rashid v. Rosmah Begum bte Bahadur Beg [1994] 2 CLJ 101 ***(refd)***

Mt Bilas Kunwar v. Desraj Ranjit Singh [1915] AIR PC 96 ***(refd)***

Board v. Board [1873] LR 9 QB 48 ***(cit)***

Toolman v. Henman [1893] LR 2 QB 168 ***(cit)***

Cuthbertson v. Irving [1859] 4 H & N 742 ***(cit)***

Andrews v. Hogan [1952] 86 CLR 223 ***(cit)***

Bateman v. Tsaoucis [1960] 61 SR (NSW) 682 ***(cit)***

Machula v. Tramer [1972] 1 WWR 550 ***(cit)***

Fong Holdings Pte Ltd v. Computer Library (S) Pte Ltd [1992] 1 SLR 332 ***(cit)***

Hill Samuel Merchant Bank Asia Ltd v. Resources Development Corporation Ltd [1992] 2 SLR 967 ***(refd)***

Newbigging v. Adam [1886] 34 Ch D 582

Car and Universal Finance Co Ltd v. Caldwell [1965] 1 QB 525 ***(cit)***

Re Hop and Malt Exchange and Warehouse Co ex p Briggs [1866] LR 1 Eq 483 ***(cit)***

Sykt. Perniagaan Ketua Kampong Kuala Selangor Sdn Bhd v. Zakaria bin Husin [1985] 2 MLJ 287 ***(cit)***

Four Seas Communications Bank Ltd v. Eng Chuan & Co & Ors [1981] 1 MLJ 4 ***(cit)***

J Selvam & Anor v. S Mehta & Anor [1981] 2 MLJ 45 ***(cit)***

Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1984] 2 MLJ 268 ***(refd)***

Re Tan Tye, Decd.; Tan Lian Chye v. British and Malaysian Trustees Ltd [1966] 2 MLJ 107 ***(refd)***
Facchini v. Bryson [1952] 1 TLR 1386 ***(refd)***
Street v. Mountford [1978] 1 WLR 1014 ***(refd)***
Ashburn Anstalt v. Arnold [1988] 2 WLR 706 ***(refd)***
Hock Yew Co v. Fraser & Neave (M) Ltd & Ors [1965] 2 MLJ 248 ***(cit)***
Cobb v. Lane [1952] 1 All ER 1202 ***(cit)***
Errington v. Errington [1952] 1 KB 298 ***(refd)***
Lewis v. Bell [1985] 1 NSWLR 73 ***(cit)***
Churchward v. Ford [1957] 2 h & h 446 ***(refd)***
Iron Trades Employers' Insurance Association v. Union of House and Land Investors Ltd [1937] 1 All ER 481 ***(refd)***
Dudley and District Benefit Building Society v. Emerson and Anor [1949] 2 All ER 252 ***(refd)***
Public Bank Berhad v. Wan Leong Hup Kee Co [1992] 2 CLJ 1076 ***(refd)***
Singapore Finance Ltd & Anor v. Matterhorn (Pte) Ltd & Ors [1983] 3 MLJ 193 ***(cit)***
Stroud Building Society v. Delamont [1960] 1 All ER 749 ***(refd)***
Doe d Parry v. Hughes [1847] 11 Jur 698 ***(cit)***
Barclays Bank v. Kiley [1961] 1 WLR 1050 ***(cit)***

Legislation referred to:
Contracts Act 1950, s. 19
Evidence Act 1950, s. 116
National Land Code 1965, s. 239

Other source referred to:
Law of Evidence, Woodroffe & Amir Ali, 15th edn, vol IV, p 325
Halsbury's Laws of England, 3rd edn, vol 23, para 1025, p 429
Landlord and Tenant, Woodfall, 29th edn, p 25

For the appellants - CV Das (Amar Chand Vohrah with him); M/s Vohrah & Tan Chee Lan
For the respondent - Avatar Singh Ram Singh; M/s Mohd Latip & Assoc

JUDGMENT

Augustine Paul JC:

By a sale and purchase agreement dated 3 August 1976 exhibited at pp. 67-87 of the Appeal Record (the AR) one Tan Chee Lan and Koh Chew Guat (the defendants in the Sessions Court and the appellants before me) purchased Shoplot No 10, First Floor, Wisma Bendahara (the shoplot) at a price of $135,135 from Matahari Land & Development Sdn Bhd (the vendor). Pursuant to cl. 1 of this agreement (see p. 66 of AR) the vendor agreed to give vacant possession to the appellants subject to the conditions contained therein. Under cl. 3(b) (see p. 67 of AR) the vendor shall arrange a loan for the appellants

a to facilitate the purchase of the shoplot subject to the condition, *inter alia*, that the appellants shall assign all their rights under the agreement to the lender. Clause 11(a) (see p. 71 of AR) required the vendor to apply for a subsidiary title for the shoplot and to transfer it to the appellants upon full payment of the purchase price subject to the rights of the lender. In accordance b with cl. 18(b) (see p. 74 of AR) the appellants were entitled to take immediate physical possession of the shoplot as licensees irrespective of whether a Certificate of Fitness had been issued or not.

By a loan agreement dated 28 December 1976 (see pp. 94-103 of AR) the appellants took a loan of $108,000 from Central Malaysian Finance Bhd (CMF) c to finance the balance of the purchase price for the shoplot. The following clauses of this agreement are relevant:

Clause (d)

In order to secure for the repayment of the loan the Borrower has agreed with d the Financier (with or without further security in the form of guarantee by some others or otherwise) to assign all his rights title and interest in and to the said Property under the said Agreement and the Deed of Assignment and to enter into the terms and conditions of the loan as hereinafter contained

e **Clause (e)**

The Borrower by a Deed of Assignment executed on even date with these presents has assigned all his said rights, title and interest to the Financier.

Clause 6 (i)

f The Borrower will not sell, transfer, lease, agree to lease let or part with possession of the said property or any part thereof nor will he accept the surrender of any lease without the written consent of the Financier which may be refused without assigning any reason thereof or given either absolutely or on such terms and conditions including the payment of increased monthly g instalments or additional interest as the Financier may deem necessary or advisable for the protection of its security and the decision of the Financier shall be final and conclusive and shall not be questions *(sic)* on any account whatsoever.

h The material parts of the Deed of Assignment executed between the appellants and CMF on 28 December 1976 read as follows:

Clause 1

That in consideration of the Finance Company having agreed to grant the said i loan the Assignor as beneficial owner hereby ASSIGNS absolutely to the

Finance Company all his rights title and interest in and to the said Parcel and under the said Agreement and Deed of Assignment and the full benefit granted thereby and all stipulations therein contained and all remedies for enforcing the same.

Clause 2

That the Assignor shall at all times hereafter keep the Finance Company safe harmless indemnified against all actions, proceedings, claims, demands, penalties, cost and expenses which may be brought or made against or incurred by the Finance Company by reason or on account of the non-observance of all or any of the stipulations on the part of the Assignor contained in the said Agreement, or otherwise howsoever, and in particular and without prejudice to the foregoing generality of the payment of the balance of the purchase price of the lot to the Vendor if the same has not been paid in full at the date hereof.

On 13 February 1979 the appellants entered into a tenancy agreement with one Dr Tan Yee Beng (the plaintiff in the Sessions Court and the respondent before me) in respect of the shoplot. The agreement is exhibited at pp. 1-7 of the Supplementary Appeal Record (the SAR). In the agreement the appellants claimed to be the co-owners of the shoplot. The tenancy was for a period of three years with an option to renew for a further two years. The material parts of the agreement read as follows:

Clause 4(n)

Upon the expiration or sooner determination of the term hereby created peaceably to deliver up to the Landlords the said lot together with the fixtures and fittings therein in tenantable repair and condition (fair wear and tear, damage by fire and any other cause beyond the Tenant's control excepted), but in the event that the term of three (3) years is determined prematurely by the Tenant then the Tenant shall be liable in damages for the total rent payable for the remaining portion of the said term at the time of such termination.

Clause 5(b)

The Tenant paying the said rent and performing the covenants on his part hereinbefore contained shall peaceably hold and enjoy the said lot during the said term without interruption by the Landlords or any person claiming under or in trust for them.

Clause 6(f)

This Agreement shall be binding upon the successors in title and assigns of the Landlords.

In accordance with the tenancy agreement the respondent went into occupation of the shoplot on 15 February 1979 (see p. 11 of the SAR). Page 8 of the SAR contains a receipt for $5,373 being deposit and rent from 15 February 1979 to 14 March 1979 from the respondent to the appellants. Page 9 of the SAR is a receipt for $1923 being rental for the period 15 March 1979 to 14 April 1979 and service charges for the period 15 February 1979 to 14 April 1979. These sums were received by the appellants from the solicitors for the respondent.

The first indication of what led rise to the present litigation is a letter dated 28 April 1979 from the solicitors for CMF to the respondent. It is at p. 18 of the SAR and the material parts of it read as follows:

> We act for the Central Malaysian Finance Berhad.
>
> Our clients have on the 17 February 1979 through their solicitors given notice to Madam Tan Chee Lan terminating the time granted to her to occupy the above property.
>
> Pursuant to the Deed of Assignment made between Madam Tan Chee Lan and our clients, we have instructions to give you notice, which we hereby do, that our clients now exercise their right as the absolute owner of the above property and you are to pay the rental of the above premises direct to our clients.

The respondent's solicitors' reply dated 2 May 1979 to the above letter to the solicitors for CMF is at p. 19 of the SAR and the material parts of it read as follows:

> Your letter of 28 April, 1979 addressed to our client, Tan Surgical Centre, has been handed to us with instructions to reply thereto.
>
> We are instructed to point out that our client has a contractual relationship with Madam Tan Chee Lan and will therefore continue to deal with her until such time when you prove to our satisfaction that you are legally entitled to collect the rent.

On the same day the respondent's solicitors wrote a letter to the 1st appellant the material parts of which read as follows:

> In connection with the above matter we enclose herewith a photostat copy of a letter to our client from M/s. Shearn, Delamore & Co., & Drew & Napier.
>
> In the light of the above, our instructions are to request you to forward to us your solicitor's undertaking that in the event that our client incurs any loss or damage of whatever nature as a result of the dispute between you and Central Malaysian Finance Berhad, then, our client will be fully compensated by you. Such compensation is to include all costs incurred by our client, legal or otherwise.

> At this juncture may we point out that under the Tenancy Agreement, our client is entitled to quiet enjoyment of the premises.

On 16 May 1979 the solicitors for the respondent wrote another letter to the solicitors for the appellants in the following terms:

> We refer you to the telephone conversation between your Mr. D'Cruz and our Mr. Das whereat you confirmed that you are acting for the Landlord of the abovesaid premises.
>
> We wish to notify you that our client has paid to us the rent for the abovesaid premises for the month beginning 15 May 1979.
>
> We are prepared to release the same to you upon receipt of your undertaking that in the event that our client incurs any loss, damage and expense (including legal costs) as a result of your clients' dispute with Central Malaysian Finance Berhad, our client will be fully compensated by your clients.

With regard to the undertaking required the solicitors for the appellants replied by letter dated 22 May 1979 in this way:

> We refer to your letter dated 16 May 1979, in respect of the above and wish to point out that cl. 5(b) of the Tenancy Agreement entered into between our clients provide the necessary protection sought. Further, it is a prerequisite for the same that your client performs the covenants on his part, inclusive of the regular payment of the rentals reserved.

In reply to this letter the respondent's solicitors repeated their request for an undertaking by letter dated 8 June 1979 in the following terms:

> Thank you for your letter dated 22 May 1979. Our instructions are to repeat that our client has paid to us the May rental for the above premises and we stand ready to release the same to you upon receiving the undertaking from you as stated in our letter of 16 May 1979.

On 18 June 1979 the solicitors for the respondent wrote a letter to the solicitors for the appellants saying that their client has paid to them the rent for the shoplot for the month beginning 15 June 1979. By letter dated 20 June 1979 to the solicitors for CMF the respondent took a somewhat different stand. The material parts of the letter read as follows:

> With regard to the above matter please be informed that our client has paid to us the rent for the months commencing 15 May and 15 June 1979.
>
> As your clients assert that they have a right to collect the rent kindly get a court order establishing the said right.
>
> We stand ready to release the money to whichever party that can present us with a court order declaring that they are the rightful landlords.

On 27 June 1979 the solicitors for the appellants wrote to the solicitors for the respondent reiterating their undertaking. The material parts of the letter are in these terms:

> We would repeat the contents of our letter dated 22 May 1979 and reiterate that our clients are at all times prepared to carry out the obligations and undertakings contained in the Tenancy Agreement entered into between our clients.
>
> Your client is now in breach of cl. 3 of the said Agreement and we hope that our clients will not be compelled to execute their rights for such continued breach by your client.

Then on 5 July 1979 the respondent's solicitors wrote to the solicitors for CMF in the following terms:

> We refer to the above matter and note that we have not been informed of any further developments from your side.
>
> Please note that we have instructions to release the rent to the other contracting party if we do not hear from you confirming that your clients have commenced legal action to establish their rights, within the next seven (7) days.
>
> Note also that this is not in any event to be taken to mean that we would release the money to you even if your client has in fact commenced legal proceedings.

By letter dated 7 July 1979, in reply to the above letter, the solicitors for CMF wrote to the solicitors for the respondent saying:

> Proceedings are being filed in this case.

By letter dated 26 July 1979 the respondent took a different stand. The letter from his solicitors to solicitors for the appellants reads this way:

> We refer to your letter dated 27 June, 1979. We write to inform you that as todate the issue between your clients and Central Malaysian Finance Berhad has not been resolved. We are instructed to give you notice which we hereby do, that unless we are notified within the next seven days that there is an Agreement between the parties as to who should receive the rent, we shall be paying all rents due and to be due into court.

On the same day the solicitors for the respondent wrote a letter to the solicitors for CMF to the same effect. In reply to this the solicitors for CMF replied by letter dated 28 July, 1979 saying:

> We accept your decision to pay the rental into court.

By letter dated 18 August 1979 the solicitors for the appellants informed the solicitors for the respondent that their client is entitled to the rental. The material parts of the letter read as follows:

> We refer to your letter dated 26 July, 1979 in respect of the above matter and would repeat the contents of our earlier letters.
>
> Your client is estopped from denying our client's title as landlord because of the Tenancy Agreement dated 13 February 1979, and it is a fact that he is presently in arrears of the rentals stipulated therein.
>
> Under the circumstances, kindly remit all outstanding rent payments to us by 23 August 1979 so that we shall not be compelled to institute distress and/or eviction proceedings against your client.

As no proceedings had been instituted by CMF the solicitors for the respondent by letter dated 28 August 1979 informed the solicitors for CMF that:

> With reference to the above matter we are informed by M/s. Vohrah & Tan Chee Lan that to-date no proceedings have been instituted against their client by your client.

In the circumstances we see no reason why our client should be inconvenienced by having to commence procedings to pay monies into court.

> In the premises we wish to inform you that our client has instructed us to release all rents deposited with us to Vohrah and Tan Chee Lan (Advocates & Solicitors).

In response to this letter the solicitors for the appellants informed the solicitors for the respondent by letter dated 17 September 1979 that:

> As explained by our Miss Tan to your Mr. Das sometime on 6 September 1979 any unlawful act on the part of Central Malaysian Finance Berhad which would cause your client to suffer loss, we have protected your client in our letter dated 14 May 1979 to M/s. Shearn Delamore & Co. solicitors for CMF, a copy of which was extended to your client.
>
> We have also telephoned Datuk Wong Seng Chow on or about 6 September 1979, re his firm's letter to you dated 7 July 1979.
>
> We have been informed that no action has been instituted.
>
> We regret to state that the Warrant of Distress against your client is ready for filing. We have withheld it because of our cordial relationship with your client.
>
> However, we cannot withhold the above indefinitely as we have also to protect our clients' interests.

> To avoid embarrassment, we hereby give you twenty four hours forthwith to remit the outstanding rents and hire charges. Upon your failure to, we believe you and your client would appreciate our duty to proceed accordingly.

By letter dated 18 September 1979 the respondent's solicitors sent the rental due to the solicitors for the appellants. The material parts of the letter read as follows:

> With reference to the above matter, we enclose herewith our UMBC Cheque No. 056166 for $6,538.60 being the rents for the months from 15 May 1979 to 14 September 1979.
>
> Please note that the rents are being released to you upon your undertaking that our client's quiet enjoyment of the premises will not be interfered with in any way and that you will be liable for any loss which our client may suffer as a result of him paying the rent to you.

By letter dated 9 October 1979 the solicitors for CMF gave the respondent a notice to quit. The notice reads as follows:

> We act for Central Malaysian Finance Berhad the owner of the above lot. We have instructions to and do hereby give you notice to quit and deliver up possession of the said Lot No. 10, First Floor, Wisma Bendahara, situate at Jalan Bendahara, Melaka which you hold of them as tenant thereof, on the 30 November 1979 next.

The respondent complained about this to the appellants.

Their solicitors' letter dated 30 October 1979 to the appellants' solicitors is as follows:

> We enclose herewith a Notice to Quit dated 9 October, 1979 which our client received from M/s. Shearn, Delamore & Co., on 11 October, 1979.
>
> Under cl. 5(b) of the Tenancy Agreement dated the 13 February, 1979 entered into between your clients and our client, your clients covenant that our client shall peaceably hold and enjoy the premises during the term of the tenancy without interruption by the Landlord or any person claiming under or in trust for them. Since April this year, our client has been harrassed by correspondences and claims from M/s. Central Malaysian Finance Bhd. culminating in the Notice to Quit abovementioned, contrary to and in breach of cl. 5(b).
>
> Under the circumstances, our client holds your clients responsible for any damages suffered as a result of the abovementioned breach.

Then on 7 November 1979 the solicitors for the respondent wrote to the appellants' solicitors saying that their client has vacated the premises. The material parts of the letter read as follows:

We refer to our letter dated 30 October, 1979.

Our client had vacated the said premises on 5 November 1979 and has handed the keys to us.

Our client had no alternative but to vacate the said premises as we have not heard from you nor had we any assurance that he may continue to occupy the said premises and his peace and quiet enjoyment had been affected.

As you took no steps to set aside the notice sent to our client by the solicitors for Central Malaysian Finance Berhad, our client was left with no alternative, but to comply with the notice and vacate the premises.

In the premises, our client has suffered losses in respect of goodwill, cost of renovation, cost of moving to alternate premises and damages generally. Our client therefore reserves his right of action against your client for the losses incurred by him.

Enclosed please find the keys to the said premises.

In reply to this the solicitors for the appellants by letter dated 29 November 1979 informed the solicitors for the respondent that:

We wish to point out that our clients are not responsible in any way for the action taken by your client and that our clients have in every way fulfilled their obligations under the tenancy agreement dated 13 February 1979.

Under the circumstances we are instructed to demand from your client which we hereby do a sum of $39,150 being the rental due for that portion of the tenancy which is still outstanding as at 5 November 1979 under cl. 4(n) of the Tenancy Agreement on the ground of premature determination of the same by your client.

We would further point out that all outstanding dues in respect of the service provided by Wisma Bendahara Services Sdn. Bhd, for the period in question should also be payable by your client as and when demand for such payment is made by the party concerned.

On 25 September 1985 the respondent filed proceedings in court against the appellants for damages arising from their surrender of the shoplot. The material parts of the Statement of Claim are as follows:

Paragraph 2

The defendants at all material times held out themselves as the co-owners of the said lot and purported to have the capacity to enter a tenancy agreement with the plaintiff.

Paragraph 5

Pursuant to cl. 5(b) the defendants covenanted with the plaintiff, that plaintiff shall peaceably hold and enjoy the said lot during the said term without interruption by the defendants or any persons claiming under or in trust for them.

Paragraph 7

It was an implied condition and covenant of the said Tenancy Agreement that the defendants then had a good right and title so to let the said lot to the plaintiff for the said term.

Paragraph 8

The defendants had not at the time of granting the tenancy, good right or title so to let the said lot to the plaintiff for the said term.

Paragraph 9

The said Tenancy Agreement was induced by the misrepresentation of the defendants by reason whereof the plaintiff has suffered damages.

Paragraph 10

After the said tenancy agreement was executed, Central Malaysian Finance Bhd (CMF) then lawfully claiming the said lot through their solicitors Messrs Shearn & Delamore & Co., and Drew & Napier by letter dated 28 April 1979 gave notice to the plaintiff that pursuant to a Deed of Assignment, Central Malaysian Finance are the absolute owners of the said lot and that all rentals are to be paid to them.

Paragraph 11

Upon the undertaking of the defendants through their solicitors Messrs Vohrah & Tan Chee Lan to protect the plaintiff against all losses contained in a letter dated 22 May 1979 the plaintiff on 18 September, 1979 paid to the defendants' solicitors rental and service charges up to 14 September 1979.

Paragraph 12

By letter dated 9 October, 1979 Central Malaysian Finance Berhad through their solicitors served on the plaintiff notice to quit and deliver up possession of the said lot on 30 November, 1979.

Paragraph 13

The plaintiff furnished a copy of the said notice to quit to the defendants solicitors and gave notice to the defendants that they will be held responsible for any damages suffered as a result of breach of cl. 5(b) of the Tenancy Agreement by the defendants.

Paragraph 14

The plaintiff failing to receive an assurance from the defendants that he may continue to occupy the said lot and because his peace and quiet enjoyment had been interfered, vacated the said lot on the 5 November 1979.

Paragraph 15

The ordinary and lawful enjoyment of the plaintiff had been substantially interfered by the acts and/or misrepresentation of the defendants.

The appellants, in their Statement of Defence, admitted, *inter alia*, paras. 2, 5 and 11 of the Statement of Claim. In para. 4 they contended that they had a good title to let the shoplot. They denied the allegation of misrepresentation. In para. 16 of the counterclaim they pleaded as follows:

> The plaintiff by having surrendered the tenancy on 5 November 1979 without the agreement of the defendants who are the persons entitled to reversion expectant thereon have committed a breach of the Tenancy Agreement and rendered himself liable to pay to the defendants all rentals due and payable for period of 15 September 1979 to 14 February 1982 and the monthly service charges for the said period payable to Wisma Bendahara Services Sdn Bhd through the defendants by virtue of cl. 4(b) (ii) of the said Tenancy Agreement.

In the trial before the learned Sessions Judge two witnesses testified, that is to say, the respondent and the 1st appellant. The respondent said that he entered into the tenancy agreement with the appellants. He then added:

> Defendan telah mewakili (represent) dirinya co-owners bagi lot tersebut.

He said that he was worried and upset when he received the letter dated 28 April 1979 from the solicitors for CMF. He then caused a letter to be written to the appellants to ask for a guarantee that his tenancy will be safe. He then said:

> Jawapannya menunjukkan yang perjanjian ada 'protection' dibawah klausa 5(b) ... Saya harapkan satu jaminan bertulis dari tuan tanah dan juga dari peguam untuk menduduki premis dengan selamat dan saya akan dapat gantirugi penuh. Selepas itu saya sambung pembayaran sewa kepada peguam saya.

With regard to his surrender of the tenancy he said:

> Surat dari Shearn & Delamore bertarikh 9 October 1979 – mengisytiharkan CMF adalah tuan tanah/pemilik premis dan saya diberi notis untuk kosongkan bangunan itu. Perasaan saya – saya berasa tertekan dan saya khuatir akan keselamatan saya dan keluarga, dan rasa malu sebagai seorang profesyenal dan bimbang akan obligasi saya terhadap perkara ini. Saya mematuhi notis itu walaupun saya rasa reluctant.

In his cross-examination he said:

> Ya, saya ikut arahan peguam saya S K Khoo kerana saya tidak tahu undang-undang. Mereka tidak mengatakan yang saya penceroboh dan tidak mengatakan yang Tan Chee Lan tidak berharap kepada sewa itu – m.s. 19.

Then he added:

> Peguam suruh saya keluar dan tidak jelaskan dan tidak bincangkan mengapa Shearn tidak boleh suruh keluar. Saya keluar pada 11/10 kerana telah buat arrangement di Seremban.

With regard to the ownership of the shoplot he said:

> Ya, semasa saya tandatangan perjanjian saya fikirkan Tan Chee Lan adalah pemilik premis itu.

In her evidence the 1st appellant said that in accordance with the sale and purchase agreement she had possession of the shoplot. With regard to the tenancy she said:

> It did not restrict me from running *(sic)* the tenancy. Notification (of) intended tenancy was given to finance company.

She said that she has still not been deprived of the premises and is in possession of the shoplot. She said that the surrender of the shoplot by the respondent amounted to a premature determination of the tenancy.

Having heard the evidence and the submissions of both the learned counsel the learned Sessions Judge gave judgment for the plaintiff with damages to be assessed later as agreed by the parties. It is against this order that the appellants have appealed. In her grounds of judgment the learned Sessions Judge said that the appellants had no capacity to enter into the tenancy agreement. As the Deed of Assignment preceded the Tenancy Agreement she found that the appellants had knowledge that they had no title to or interest in the shoplot. In her opinion the failure of the appellants to give protection to the respondent when the notice to quit was served on him also meant that they knew from the beginning that they had no interest in the shoplot. She said that by entering into the Deed of Assignment the appellants had given up all their rights and interests in the shoplot. In the circumstances the

appellants had no capacity to enter into the Tenancy Agreement and were in no position to give any protection under the agreement. Accordingly, she concluded, the respondent was entitled to terminate the agreement and had the right, thereafter, to deny the right of the appellants to rent out the shoplot. She also said that as the appellants had not obtained the consent of CMF in granting the tenancy it was void. With regard to the allegation of misrepresentation she said that the respondent believed that the appellants were the co-owners of the shoplot and that this misrepresentation authorised the respondent to terminate the agreement as provided by s. 19 of the Contracts Act 1950.

I then considered the issues involved based on the submissions made before me by both the learned counsel to which I shall progressively refer in the course of the judgment.

The Right Of The Respondent To Challenge The Title Of The Appellants

Learned counsel for the appellants contended that the respondent was estopped from denying the title of the appellants as provided by s. 116 of the Evidence Act 1950 which reads as follows:

> No tenant of immovable property, or person claiming through the tenant, shall during the continuance of the tenancy be permitted to deny that the landlord of that tenant had at the beginning of the tenancy a title to the immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that that person had a title to such possession at the time when the licence was given.

He then referred to *Ban Seng v. Yap Pek Soo* [1967] 2 MLJ 156 where judgment had been entered by the Magistrate in favour of the respondent on his claim against the appellant for arrears of rent in respect of half portion of premises known as No 19A Jalan Kasipillai. The respondent had put up the premises in question on state land with the permission of the then holder of the temporary occupation licence in respect of the land. In 1960 he allowed the defendant to go into occupation as a monthly tenant. The defendant paid rent regularly for six years but stopped paying rent after he received a summons for illegal occupation of state land. His defence was that he was not liable to pay rent as the house was illegally erected on State land. It was held that the fact that the respondent had no temporary occupation licence at the beginning of the tenancy or at any time subsequently was no bar to the action and the learned Magistrate was right in entering judgment in his favour. Learned counsel then referred to the decision of the English Court of Appeal in *Industrial Properties (Barton Hill) Ltd and Others v. Associated Electrical Industries Ltd* [1977] 2 WLR 726. That case referred to the earlier English case of *Harrison v. Wells* [1967] 1 QB 263 where it was held that the doctrine

that a tenant cannot dispute his landlord's title only applied whilst the tenant was in possession and that it did not apply when the tenant had gone out of possession. The Court of Appeal in overruling the *Harrison* decision held that the rule that a lessee was estopped during the currency of the lease from disputing his lessor's title continued to operate even after the expiry of the lease unless after the termination of the lessee's possession a claim was made against him by title paramount in respect of some part of the period of the lease. Accordingly, learned counsel contended, the respondent is estopped from denying the title of the appellants even though he had vacated the premises.

In his submission learned counsel for the respondent referred to *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21 where it was held that *Ban Seng v. Yap Pek Soo* [1967] 2 MLJ 156 relied on by learned counsel for the appellants was no longer to be regarded as good law. Thus, he said, a tenant can surrender the tenancy and challenge the title of the landlord. He also contended that the *Harrison* decision which was overruled by the English Court of Appeal in the *Industrial Properties (Barton Hill) Ltd* case represents the correct law in the light of the specific provisions of s. 116 of the Evidence Act 1950.

I shall now consider the submissions on law made by both the learned counsel. In *Fatimah v. Moideen Kutty* [1967] 1 MLJ 72 the Federal Court held that s. 116 of the Evidence Act does not prevent a tenant from pleading that the title of the original lessor has since come to an end. This case renders the *Ban Seng* decision inapplicable as the latter clearly goes beyond the scope of s. 116. *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21 describes the operation of s. 116 in crystalline terms. In that case Raja Azlan Shah (as His Highness then was) in delivering the judgment of the Federal Court said at p. 24:

> In our view, the relationship of landlord and tenant can be created only by a contract, valid according to the law subsisting at the time of its execution or can be created or continued by operation of law. Now s. 116 of the Evidence Act enacts that no tenant of immovable property shall, during the continuance of the tenancy be permitted to deny that the landlord of such tenant, had, at the beginning of the tenancy a title to such immovable property. The words 'during the continuance of the tenancy' are important and make it clear that where there is no legal tenancy, the provisions of the section are not applicable. That being so, where the contract of tenancy has come to an end by effluxion of time, there is no legal contract of tenancy and therefore there can be no question of the continuance of such tenancy. The tenant in consequence can later challenge the status of the landlord, and he cannot be deemed to be estopped from denying that the title of the landlord has come to an end. We are of the view that the decision in *Ban Seng v. Yap Pek Soo, supra*, is now no longer good law.

As the estoppel operates only for so long as the tenant remains in possession he may surrender possession of the premises tenanted and challenge the title of the landlord. In this regard I refer to *Rosman bin Haji Abdul Rashid v. Rosmah Begum bte Bahadur Beg* [1994] 2 CLJ 101 where Malik Ishak JC (as he then was) said at p. 202:

> In *Hirabai* [1955] AIR Nagpur 234 the question posed for decision was whether a tenant could deny the title of his landlord after the termination of the tenancy. The court in delivering its judgment quoted with approval the following passage by Mooker J in *Bhaiganti Bewa v. Himma*t [1917] AIR Cal 498:
>
> > Enjoyment by permission is the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord. Two conditions then are essential to the existence of the estoppel, first possession, secondly permission; and when these conditions are present, the estoppel arises, and the estoppel prevails so long as such possession continues.

Again the court in delivering its judgment referred to a decision of the Privy Council in *Mt Bilas Kunwar v. Desraj Ranjit Singh* [1915] AIR PC 96 and said:

> In (that case) the suit was brought for possession by the landlord against the tenant who refused to deliver possession after a notice to quit. Their Lordships observed: ... a tenant who has been let into possession cannot deny his landlord's title however defective it may be, so long as he has not openly restored possession by surrender to his landlord ... The fact that in the present case the tenancy came to an end by reason of forfeiture and the landlord served a notice asking the tenants to vacate the house did not make any difference to the applicability of the rule of estoppel which is grounded on the tenant being still on the premises which he had obtained from the landlord. The estoppel continues so long as the tenant does not surrender possession to the landlord.

In the light of the law that I have discussed thusfar the reasoning by the English Court of Appeal in the *Industrial Properties (Barton Hill) Ltd* case that the estoppel continues to operate even after the expiry of the lease is, with the utmost respect, incompatible with the meaning contemplated by s. 116. The *Harrison* decision which was overruled by that case accords with our law.

Once s. 116 becomes applicable the tenant is estopped from denying his landlord's title for so long as he is in possession of the premises. This is so even though the landlord's title is merely equitable, and therefore at law a nullity (see *Board v. Board* [1873] LR 9 QB 48). The estoppel also operates in favour of a lessor who has no title whatsoever (see *Toolman v. Henman* [1893] LR 2 QB 168). Where a lessor, without any legal estate or title,

demises to another, the parties themselves are estopped from disputing the validity of the lease on that ground; in other words, a tenant cannot deny his landlord's title nor can the lessor dispute the validity of the lease (see *Cuthbertson v. Irving* [1859] 4 H & N 742).

I shall now consider the submission of learned counsel for the respondent that since the respondent has surrendered the tenancy he is not estopped from denying the title of the appellants as he is no longer in possession of the shoplot. The argument of learned counsel is worthy of consideration only if, in the first place, the surrender was effected lawfully. The appellants have pleaded in para. 18 of their counterclaim that the respondent's surrender of the tenancy without their consent amounts to a breach of the tenancy agreement. Clause 4(f) of the agreement requires the respondent not to, *inter alia*, part with the actual or legal possession of the shoplot without the prior written consent of the appellants. In fact cl. 4(n) contains penalties for premature determination of the tenancy by the respondent. It has been held in an Australian case that a surrender could not be effected by unilateral act and the assent of both parties to the lease is required (see *Andrews v. Hogan* [1952] 86 CLR 223). Evidence of expression of an intention to surrender by a lessee, without any evidence of acceptance of the surrender by the lessor, is not of itself any evidence of a surrender (see *Bateman v. Tsaoucis* [1960] 61 SR (NSW) 682). In Malaysia the manner of effecting a surrender of a tenancy is governed by s. 239 of the National Land Code which reads as follows:

> 239(1) Any lease, sub-lease or tenancy exempt from registration (whether granted before or after the commencement of this Act) may, with the agreement of the person or body for the time being entitled to the reversion expectant thereon, be surrendered to that person or body in accordance with the following provisions of this section.
>
> (2) The surrender of any lease or sub-lease shall be effected by an instrument in Form 15C, and the interest of the lessee or sub-lessee, as the case may be, shall determine as from the date on which the instrument is registered.
>
> (3) The surrender of any tenancy exempt from registration may (as provided by sub-s. (2) of s. 213) be effected either by word of mouth or by a written instrument in any form whatsoever; and the person or body in whose favour the surrender is effected may, if the tenancy was protected by an endorsement on the register document of title pursuant to Chapter 7 of Part Eighteen, apply under that Chapter for the cancellation of the endorsement.
>
> (4) The surrender of any lease, sub-lease or tenancy shall require the consent also of any chargee thereof, or of the reversion expectant thereon; and the consent of any such chargee shall be signified:

(a) in the case of a lease or sub-lease, by his joining in the instrument of surrender, as indicated in Form 15C; and

(b) in the case of a tenancy, in writing signed by him or his lawfully authorised agent.

(5) The surrender of any lease, sub-lease or tenancy shall not extinguish any sub-lease or tenancy granted thereout, but any such sub-lease or tenancy shall thereafter have effect, and be construed in all respects, as if it had been granted in the first instance by the person or body in whose favour the surrender is effected.

As the tenancy in this case was for a term of three years it is a tenancy exempt from registration and a surrender of it can be lawfully made only by following what is prescribed in s. 239(1) and (3) of the National Land Code under which a surrender may be oral or written provided that it is done with the agreement of the landlord. Thus the surrender of the tenancy by the respondent would amount to a surrender in law only with the consent of the landlord who for the purposes of the suit filed by the respondent were the appellants. There can be no dispute that the respondent vacated the premises without such consent. In the circumstances the surrender by the respondent does not amount to a surrender in law. Actual possession is not necessary to constitute possession in law. Proof of symbolical possession would be sufficient in cases where such possession amounts to actual possession in the eyes of the law (see *Law of Evidence* by Woodroffe & Amir Ali 15th Edn. Vol. IV p. 325). Where a tenant, holding under a lease for a term certain, abandons the premises during the life of the term, he remains liable under the lease unless there has been a surrender (see *Machula v. Tramer* [1972] 1 WWR 550). Thus the respondent was still in possession of the shoplot in law even though he was not in actual possession. Accordingly, the estoppel created by s. 116 would continue to operate.

A related matter that arises for deliberation is whether the respondent was justified in vacating the premises as he had been served with a notice to quit by the holder of a superior title. It is trite law that in such circumstances the holder of a paramount title may lawfully evict the tenant if he chooses not to accept him as his tenant. I shall consider in a later part of the judgment whether CMF had accepted the respondent as their tenant. For present purposes it is sufficient to say that by letter dated 7 November 1979 the respondent handed the keys to the shoplot to the appellants following the notice to quit served on him by CMF. The appellants protested to this by their letter dated 29 November 1979. The position therefore is that the respondent made a unilateral surrender of the tenancy by handing over the keys to the appellants based on a notice to quit issued by CMF. It has been decidedly declared that

the return of the keys by the tenant coupled with their retention by the landlord is not sufficient to effect a surrender, unless there is some unequivocal act of retaking possession of the premises by the landlord (see *Fong Holdings Pte Ltd v. Computer Library (S) Pte Ltd* [1992] 1 SLR 332). As there was no such unequivocal act on the part of the appellants there was no surrender of the tenancy in law by the respondent.

I interpolate to add that the finding by the learned Sessions Judge that the appellants did not take any steps to protect the respondent after he received the notice to quit is groundless. There is sufficient protection for the respondent in cl. 5(b) of the tenancy agreement. This is reiterated by letters dated 22 May 1979, 27 Jun 1979, 17 September 1979 and 18 September 1979 from the appellants to the respondent which I have reproduced earlier. In the light of the undertaking given by the appellants the respondent ought to have remained in the premises and brought them as a party if sued by CMF. In this regard I refer to the *Industrial Properties Barton Hill Ltd* decision where Lord Denning MR said at p. 737:

> If the tenant is so confronted, his proper course nowadays is not to side with either claimant – but to let one or other of them sue him – and to bring in the other as a party – under the wide powers now given in RSC O. 15 r. 6(2)(b), which re-establishes *In re Vandervell's Trusts* in this court [1970] Ch 44, thus making interpleader available in respect of land.

As the respondent has not lawfully gone out of possession of the shoplot he is precluded from denying the appellants' title on that ground. But he could still do so if he can establish that the tenancy is not valid. In *DV Rajam v. PG Rajiah* AIR [1953] Hyd 241 it was held that in order to invoke the principle of estoppel under s. 116 the real question to be decided is not whether the tenant was let into possession by the landlord but whether a valid tenancy has arisen. Manohar Pershad J added at p. 241:

> The tenant may show that no valid tenancy has been created between the landlord and himself because the lease was executed under a mistake or in consequence of the fraud, misrepresentation or coercion practised on him by the landlord. But in the absence of any such circumstance as would avoid a contract, the execution of a lease or a verbal agreement to hold as a tenant would constitute a valid tenancy and bring in the estoppel.

In this connection it is the case for the respondent, as pleaded in his Statement of Claim, that he was induced by the misrepresentation of the appellants, to wit, that they were the co-owners of the shoplot, to enter into the tenancy agreement. It is the finding of the learned Sessions Judge that as the respondent believed the appellants' representation that they are the co-owners of the shoplot the respondent is entitled to avoid the tenancy agreement entered into between them pursuant to s. 19 of the Contracts Act 1950 which reads as follows:

> 19(1) When consent to an agreement is caused by coercion, fraud or misrepresentation the agreement is a contract voidable at the option of the party whose consent was so caused.
>
> (2) A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true.
>
> EXCEPTION – If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of s. 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.
>
> EXPLANATION – A fraud or misrepresentation which did not cause the consent to a contract of the party on whom the fraud was practised, or to whom the misrepresentation was made, does not render a contract voidable.

A representation does not render a contract voidable unless it was intended to cause and has in fact caused the representee to make the contract. It must have produced a misunderstanding in his mind, and that misunderstanding must have been one of the reasons which induced him to make the contract. A false statement, whether innocent or fraudulent, does not per se give rise to a cause of action. A representee who does not allow the representation to affect his judgment cannot make it a ground for relief (see *Hill Samuel Merchant Bank Asia Ltd v. Resources Development Corporation Ltd* [1992] 2 SLR 967). In this regard the only finding of the learned Sessions Judge is that the respondent believed the representation. There was no further finding that the respondent was thereby induced to enter into the agreement. Neither could I find any evidence to that effect in the Notes of Evidence. The finding of the learned Sessions Judge, on its own, does not entitle the respondent to rescind the agreement.

Be that as it may, it must be noted that s. 19 of the Contracts Act 1950 only renders the agreement voidable. This means that the contract is valid till it is set aside by the representee (see *Newbigging v. Adam* [1886] 34 Ch D 582). Upon realisation of the misrepresentation the representee may elect to affirm or to rescind the contract. Affirmation is complete and binding when the representee, with full knowledge of the facts and of the misrepresentation, either declares his intention to proceed with the contract or does some act from which such an intention may reasonably be inferred (see *Car and Universal Finance Co Ltd v. Caldwell* [1965] 1 QB 525). Thus a person who applies for and obtains shares upon the faith of prospectus containing misrepresentation is entitled to rescind the allotment and to recover the price paid; but if after learning of the misrepresentation he attempts to sell the

shares or pays money due upon the allotment or retains dividends paid to him, he loses his right of rescission, since these acts show an intention to treat the contract as subsisting (see *Re Hop and Malt Exchange and Warehouse Co, ex p Briggs* [1866] LR 1 Eq 483). It is my view that even if it can be argued that there was a misrepresentation by the appellants it had been affirmed by the respondent and, in consequence thereof, he loses his right of rescission. The letter dated 28 April 1979 from CMF notified the respondent that they were the absolute owners of the shoplot. Thereafter the respondent took steps to ensure that the appellants would compensate him in the light of the dispute between them and CMF. He paid the rental due to his solicitors to be released to the appellants once they gave the undertaking sought by letters dated 16 May 1979 and 8 June 1979. By letter dated 18 September 1979 the respondent's solicitors released the arrears of rental due to the appellants. This means that the respondent had affirmed the tenancy agreement.

Notwithstanding what I have said so far it is my view that the appellants are precluded from relying on estoppel as a defence as they have not pleaded it. (See *Syarikat Perniagaan Ketua Kampong Kuala Selangor Sdn Bhd v. Zakaria bin Husin* [1985] 2 MLJ 287; *Four Seas Communications Bank Ltd v. Eng Chuan & Co & Ors* [1981] 1 MLJ 4). Furthermore, at the time of institution of this suit the respondent was no longer in possession of the shoplot in fact and in law. The estoppel created by s. 116 operates only during the continuance of the tenancy. In the *Singma Sawmill Co Sdn Bhd* case it was held that where a contract of tenancy has come to an end by effluxion of time, there is no legal contract of tenancy and therefore there can be no question of the continuance of such tenancy. A tenant can in consequence challenge the status of the landlord. The tenancy agreement in this appeal executed on 13 February 1979, was for a period of three years with effect from 15 February 1979. It would therefore have expired on 14 February 1982. This action was commenced by the respondent on 25 September 1985. At that point of time the tenancy agreement would no longer have been in force even if the respondent had been in actual continuous occupation as its term would then have expired by effluxion of time. It therefore follows that the respondent can lawfully challenge the title of the appellants. The respondent's challenge, though ventilated through a different route, can be stated as follows:

(a) That the appellants did not have the capacity to grant the tenancy at the time of entering into the tenancy agreement.

(b) That the tenancy agreement is invalid as it was entered into without the consent of CMF.

I shall now consider both these issues.

(a) **That the appellants did not have the capacity to grant the tenancy at the time of entering into the tenancy agreement**

It was the finding of the learned Sessions Judge that the appellants had no capacity to enter into the tenancy agreement. In his submission learned counsel for the appellants contended that the learned Sessions Judge had not directed her mind to the fact that the appellants had possession of the premises. Under the sale and purchase agreement the appellants were given actual physical possession of the premises. He added that a landlord need not be the actual registered proprietor of the premises tenanted and, in support, he referred to *J Selvam & Anor v. S Mehta & Anor* [1981] 2 MLJ 45. In his submission learned counsel for the respondent contended that as the appellants had no capacity to enter into the tenancy agreement the agreement was void.

In order to determine whether the appellants had the capacity to enter into the tenancy agreement it is necessary to ascertain, following the deed of assignment executed by them, whether they were mere licensees of CMF in which event they would have no authority to grant tenancies or whether the relationship between them and CMF gave them such right. The first matter to be resolved is whether the deed of assignment from the appellants to CMF is absolute or by way of a charge only. For this purpose the loan agreement entered into by the parties cannot be taken into account. In this regard Seah FJ in delivering the judgment of the Federal Court in *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1984] 2 MLJ 268 said at p. 270:

> It was contended that since the assignment was entered into following the execution of a loan agreement between the appellant and the Public Bank, the said assignment should not be read in isolation but should be read in conjunction with the said loan agreement. With respect we do not agree. In our judgment and it seems clear from the authorities above-mentioned, whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s. 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself.

As the deed of assignment in this case is similarly worded as the one in the *Nouvau* decision where it was held to be an absolute assignment I have no hesitation in ruling that the deed of assignment between the appellants and CMF is an absolute one. That, however, does not mean that the loan agreement is devoid of any legal ramifications.

Although it is clear that the loan agreement between the appellants and CMF cannot be used to ascertain the status of the deed of assignment it can still be used to determine the contractual relationship between the parties to it with regard to their respective rights over the shoplot following its assignment. As Winslow J said in delivering the judgment of the Federal Court in *Re Tan*

Tye, Decd.; Tan Lian Chye v. British and Malaysian Trustees Ltd [1966] 2 MLJ 107 the relationship between the parties to a contract with regard to the occupation of premises is determined by the law and not by the label which the parties choose to use. In *Facchini v. Bryson* [1952] 1 TLR 1386 Denning LJ emphasised that it is important to find the true relationship between the parties "... or else we might find all landlords granting licences and not tenancies, and we should make a hole in the Rent Acts ...." (at p. 1390). If this was not so a landlord could exploit his superior bargaining position by drafting the agreement as a "licence agreement". It is a common practice to require the occupier to sign a declaration acknowledging that he is only a licensee and not a tenant. This happened in the landmark case of *Street v. Mountford* [1978] 1 WLR 1014. That case revolved around a written agreement whereby Mrs Mountford was granted the right to occupy a single furnished room at a certain "licence fee" per week. The agreement provided that "this personal licence is not assignable", that the "licence" may be terminated by 14 days' written notice and that the licensee understood and accepted that "a licence in the above form does not and is not intended to give me a tenancy protected under the Rent Acts". The Court of Appeal held that the written acknowledgment by the occupier that no tenancy was intended was conclusive that a licence had been created notwithstanding the fact of exclusive possession. The decision was reversed by the House of Lords which found that Mrs Mountford was a tenant. The House held that in order to constitute a tenancy the occupier must be granted exclusive possession for a fixed term in consideration of a premium or periodical payments. In the *Re Tan Tye, Decd* decision it was held that the fact of a person being let into exclusive possession is *prima facie* evidence of an intention to create a tenancy. In *Ashburn Anstalt v. Arnold* [1988] 2 WLR 706 it was held that the payment of rent has been held not to be necessary for the creation of a tenancy. I must point out that in this case a finding of whether the appellants were lessees or not does not arise. What requires consideration is whether they had rights analogous to a lessee or were merely licensees. This is critical because if it is found that the appellants were mere licensees then they would have no power to grant a tenancy to the respondent (see *Hock Yew Co v. Fraser & Neave (M) Ltd. & Ors.* [1965] 2 MLJ 248).

In deciding whether an occupation amounts only to a licence the question to be asked according to Denning LJ in *Cobb v. Lane* [1952] 1 All ER 1202 is:

> The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land?

if the answer to this question is in the affirmative then the occupier will be held to be a licensee. In this regard I also refer to *Halsbury's Laws of England* 3rd Edn, Vol. 23 para. 1025 at p. 429 where it is stated as follows:

> A licence is normally created where a person is granted the right to use premises without becoming entitled to exclusive possession thereof, or the circumstances and conduct of the parties show that all that was intended was that the grantee should be granted a personal privilege with no interest in the land. If the agreement is merely for the use of the property in a certain way and on certain terms while the property remains in the possession and control of the owner, the agreement will operate as a licence, even though the agreement may employ words appropriate to a lease.

In determining the intention of the parties the surrounding circumstances and the conduct of the parties can also be considered notwithstanding the fact that there is a written agreement. In this regard the Federal Court in the *Re Tan Tye, Decd.* decision referred to *Errington v. Errington* [1952] 1 KB 298 where Denning LJ said:

> Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege, with no interest in the land, he will be held to be a licensee only.

The circumstances of this case reveal that the appellants executed the deed of assignment in favour of CMF solely for the purpose of obtaining a loan to finance the purchase of the shoplot. As stated in cl. 3(b)(i) of the sale agreement between the vendors and the appellants the deed of assignment was executed to serve as security for repayment of the loan. The appellants were also permitted by cl. 5(i) of the loan agreement to redeem the shoplot at any time by paying the full sum due. This indicates that the intention of the parties was that the appellants shall have exclusive possession of the premises. Furthermore, cl. 4 of the deed of assignment executed between the appellants and the vendor states that:

> This instrument shall be binding on the next of kins, personal representatives, assigns and successors in title of the parties hereto.

Clause 14(g) and (h) of the loan agreement between the appellants and CMF reads as follows:

> (g) the expression 'the Borrower' includes all persons deriving title under the Borrower, successors in title and assigns and
>
> (h) the expression "Financier" includes its successors in title and assigns.

The two clauses that I have reproduced above show that the obligations and rights of the appellants do not amount to a personal privilege which is a hallmark of a licence. They also bind the successors in title and assigns of the appellants. A provision such as this seems to show that a licence was never intended. A term indicating that the occupier can transfer his right to possession reinforces a claim to exclusive possession thereby excluding a licence (see *Lewis v. Bell* [1985] 1 NSWLR 73). By way of analogy in the *Re Tan Tye, Decd* decision a provision in the agreement that:

> This licence shall determine on the death or bankruptcy of the licensee in the case of an individual and on winding up in the case of a limited liability company.

was held to show that

> ... a lease was never intended. Such a provision is not only inconsistent with but repugnant to a lease or tenancy. It is well known that in the case of a tenancy neither death nor bankruptcy work an automatic termination thereof. On bankruptcy, for example, the Official Assignee steps into the bankrupt's shoes (though he may disclaim an onerous tenancy).

Since the rights and obligations of the appellants are not personal to them as they also bind their successors in title and assigns their occupation of the shoplot cannot amount to that of mere licensees in law. The loan agreement therefore vests certain interests in the appellants pursuant to which they can lawfully grant a tenancy. The fact that they have assigned their title makes no difference. It was held in *J Selvam & Anor v. S Mehra & Anor* [1981] 2 MLJ 45 that a landlord need not be the actual registered proprietor. The word "landlord" does not mean the lord of the soil, but the person between whom and the tenant the relationship of landlord and tenant exists (see *Churchward v. Ford* [1957] 2 h & h 446).

Be that as it may, a right to grant a lease or tenancy may be given by an instrument to a person notwithstanding the fact that no estate or interest is conveyed to him. In this regard Woodfall on *Landlord and Tenant* 29th Edn, says at p. 25:

> The right to grant a lease may either be incident to the lessor's estate or interest in the land, as where the power is conferred by the common law or by the provisions of a statute, **or it may be specially conferred by express words in an instrument.** (Emphasis added)

Clause 6(i) of the loan agreement unambigously authorises the appellants to, *inter alia*, transfer, lease or let the shoplot though with the consent of CMF. Thus this clause expressly confers on the appellants the power to let the shoplot subject to fulfilment of the condition contained therein. In the face of

such a patent provision flowing from the contractual agreement between the appellants and CMF the argument that the former had no power to let the shoplot cannot be sustained.

In the circumstances it is my view that the appellants had the capacity to enter into the tenancy agreement.

(b) **That the tenancy agreement is invalid as it was entered into without the consent of CMF**

Clause 6(i) of the loan agreement between the appellants and CMF stipulates that the appellants shall not, *inter alia*, lease or let the shoplot without the written consent of CMF. It cannot be disputed that the appellants entered into the tenancy agreement with the respondent without the written consent of CMF. The learned Sessions Judge had said in her grounds of judgment that the failure of the appellants to obtain the consent of CMF in granting the tenancy rendered it void. Learned counsel for the respondent took a similar stand before me.

Iron Trades Employers' Insurance Association v. Union of House and Land Investors Ltd [1937] 1 All ER 481 provides useful guidance in determining the legal effect of a tenancy created without obtaining the required consent. In that case a mortgage contained the usual restriction upon the mortgagor's statutory leasing powers that such powers should not be exercised without the previous written consent of the mortgagee. The mortgagors entered into a tenancy agreement without obtaining such consent and the mortgagee contended that the entering into such tenancy agreement was a breach of the covenant. In holding that the lease is not binding on the mortgagee though it is valid as between the mortgagors and the lessee Farwell J said at p. 484:

> So far as the mortgagor was concerned, it would be binding upon him, and against the lessee he would be estopped from denying the existence of the lease or that he had granted it. Except against the mortgagee or against any person having a title paramount to the mortgagee, such a lease would be good and the lessee would be entitled to the benefit conferred thereby; but as against the mortgagee the lessee would have no estate or interest under the lease ...

And at p. 488:

> The only effect of the lease was between the mortgagor and the lessee, and it was not in any sense binding upon nor could it be operative against the mortgagees who could take any steps they thought fit to put an end to the occupation of the tenants.

The *Iron Trades* case was approved by the English Court of Appeal in *Dudley and District Benefit Building Society v. Emerson and Anor* [1949] 2 All ER 252. In that case Evershed MR said at p. 255:

> I am content to take the language of the *Earl of Selbourne LC in Corbett v. Plowden* [1884] 25 Ch D 678, where he said (25 Ch D 681).
>
> > If a mortgagor left in possession grants a lease without the concurrence of the mortgagees (and for this purpose it makes no difference whether it is an equitable lease by an agreement under which possession is taken, or a legal lease by actual demise) the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagees may be asserted against both of them.
>
> I am content, for the purpose of the question which we have to consider, to take as the correct relevant statement the passage from Lord Selborne's judgment which I have just read, and to assume, therefore, to borrow his language, that the second defendant, the tenant in this case has a precarious title, good as between himself and the mortgagor, but liable to be defeated on the assertion by the mortgagees of their paramount title. **Until that happens, the second defendant can remain lawfully in possession.** (Emphasis added)

And at p. 259:

> ... there was nothing unlawful in the grant by the mortgagor to the second defendant of his tenancy ... It was a matter effective only between the parties to the particular contract.

Against the background of the English cases that I have referred to the decision in the local case of *Public Bank Berhad v. Wan Leong Hup Kee Co* [1992] 2 CLJ 1076 where it was held that the tenancy granted by the chargor without the consent of the chargee is invalid is logical as the proceeding was instituted by the purchasers of the premises at a public auction against the tenants. What was in issue was the validity of the tenancy as between the successors in title of the chargee and the tenant and is therefore not relevant to the matter before me. Needless to say, the tenancy agreement in that case between the chargor and the tenant would have been lawful originally. In the premises the tenancy agreement in the appeal before me entered into between the appellants and the respondent without the consent of CMF is lawful as between themselves. The legality of the agreement as between the appellants and CMF is no concern of the respondent.

Be that as it may, the conduct of CMF precludes the respondent from arguing that the tenancy agreement is unlawful on the ground that it was entered into without the consent of CMF. The holder of a title paramount may impliedly consent to a tenancy agreement entered into without his express agreement.

It is settled law that in such cases there must be some positive act emanating from the holder of a title paramount from which one can reasonably infer that he has consented or acquiesced to the tenancy which has been created (see *Singapore Finance Ltd & Anor v. Matterhorn (Pte) Ltd & Ors* [1983] 3 MLJ 193). In this regard Cross J (as he then was) said in *Stroud Building Society v. Delamont* [1960] 1 All ER 749 at p. 751:

> ... when a mortgagor has granted a tenancy which is not binding on the mortgagee the latter can, instead of treating the tenant as a trespasser, consent to treat him as his own tenant or he may act in such a way as precludes him from saying that he has not consented to take him as a tenant. Such an acceptance by the mortgagee of the mortgagor's tenant, whether express or implied, or operating by way of estoppel, must, I think, amount to a creation of a new tenancy between the parties. The tenancy between the mortgagor and the tenant is not one which is merely voidable by the mortgagee if he chooses not to accept it, but which he can confirm by waiving his right to avoid it. It is a nullity as against the mortgagee and so, if the mortgagee is to loose his right to treat the mortgagor's tenant as a trespasser, it must be because the tenant has become the mortgagee's tenant under a new tenancy.

It has been held that an inspection by the mortgagee of improvements made to the property by the lessee of the mortgagor is not itself evidence that he has accepted the lessee as his tenant (see *Doe d Parry v. Hughes* [1847] 11 Jur 698). However, a mortgagee who sent the mortgagor's tenant a notice to quit "which you hold as tenant of" the mortgagee was held to have accepted the mortgagor's tenant as his own (see *Stroud Building Society v. Delamount* [1960] 1 All ER 749; *Barclays Bank v. Kiley* [1961] 1 WLR 1050).

> In this appeal CMF by letter dated 28 April 1979 informed the respondent that they are the absolute owners of the shoplot and that he is "... to pay the rental of ..." the shoplot direct to them. By letter dated 9 October 1979 CMF gave the respondent a notice to quit. In the notice the solicitors for CMF specifically referred to the shoplot and said ".... which you hold of them as tenant thereof ..." This amounts to a positive act on the part of CMF accepting the respondent as their own tenant.

In the upshot the respondent has no cause of action against the appellants. As the surrender of the tenancy by the respondent was unlawful the appellants are not in breach of the tenancy agreement. Alternatively, as CMF had accepted the respondent as their tenant his cause of action, if any, lies against them only. Accordingly, I allowed the appeal with costs. With regard to the counterclaim the learned Sessions Judge had omitted to make any order on it. It is my view that as CMF had taken over the tenancy the appellants have no cause of action against the respondent and the counterclaim ought to be dismissed with costs.

Reported by Anne Soh